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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2009 MAR 10 P 2:09

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:

MARK W. BOSWORTH and LISA A.
BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE
V. VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L.
SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE
BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES,
L.L.C., an Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS,
L.L.C., an Arizona limited liability company;

Respondents.

DOCKET NO. S-20600A-08-0340

**RESPONSE TO RESPONDENTS MICHAEL J.
AND PEGGY L. SARGENT'S NOTICE OF
FILING IN SUPPORT OF MOTION TO STAY**

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission
DOCKETED

MAR 10 2009

DOCKETED BY

The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Michael J. and Peggy L. Sargent's ("Sargent") Notice of Filing in Support of Motion to Stay ("the Notice") in which Sargent complains about a subpoena to the custodian of records of Respondent 3 Gringos Mexican Investments, L.L.C. ("3GMI") and argues not only that the subpoena could not possibly be for anything other than to further a criminal investigation, but that every time the Division issues a subpoena after the initiation of an administrative contested case¹, it is evidence that a criminal investigation is underway.

¹ "...any proceeding...in which the legal rights, duties or privileges of a party are required or permitted by law to be determined by an agency after an opportunity for an administrative hearing." A.R.S. § 41-1001(4).

1 The Division has good reason to believe that Sargent, a member of 3GMI, is the custodian
2 of records of 3GMI and, since the previously issued subpoena to the custodian of records of
3 3GMI that was delivered to Respondent Mark W. Bosworth, another member of 3GMI, has not
4 been complied with, the Division delivered the subpoena at issue to Sargent. Now, to avoid
5 compliance with the subpoena, Sargent is trying to implicate his Fifth Amendment rights by
6 wildly claiming that the only possible reason for the Division issuing the subpoena is to further a
7 criminal investigation and that every time the Division issues a subpoena after the initiation of an
8 administrative contested case, it is evidence that a criminal investigation is underway.

9 Sargent's Fifth Amendment rights are not implicated in this matter for the following
10 reasons: 1) the subpoena is for the records of 3GMI, not to further a criminal investigation; 2)
11 after the initiation of an administrative contested case, the Division may continue to investigate
12 and issue subpoenas; and, 3) custodians of records do not have Fifth Amendment rights.

13 The subpoena at issue is for the records of 3GMI. It was not issued to further a criminal
14 investigation as Sargent falsely concludes after stating that "the close working relationship
15 between the Attorney General's Office and the Division...is conclusive proof of the criminal
16 investigation," that "no other plausible reason for the issuance of [the] subpoena exists," and that
17 "the only rationale for issuing the subpoena is to further a criminal probe." Having provided
18 absolutely no proof that the subpoena is for anything other than the records of 3GMI, these
19 conclusory statements by Sargent must be ignored.

20 After the initiation of an administrative contested case, the Division may continue to
21 investigate and issue subpoenas. The Division is not limited to the discovery provisions
22 contained in the Arizona Administrative Procedures Act (APA) and, as such, Sargent must not be
23 allowed to frustrate legitimate Division investigations by asserting without citation to any
24 authority that, once the Division has initiated an administrative contested case, it can no longer
25 conduct any further investigation and that any further investigation necessarily means that a
26 criminal investigation is underway.

1 Just as the APA does not preempt or preclude a public records request by a respondent
2 under § 39-121, nothing in A.R.S. §§ 41-1062, 44-1822, or 44-1823 indicates that the APA
3 preempts or precludes the investigative powers of the Commission after the initiation of an
4 administrative contested case. A.R.S. § 44-1822 gives the Commission and the Division broad
5 authority to investigate violations of the Securities Act. By giving the Division the power to
6 investigate the offer, sale, or purchase of securities “at any time,” the statute does not expressly
7 limit the power of the Division to investigate after the initiation of an administrative contested
8 case.

9 Federal courts have construed statutes similar to A.R.S. § 44-1822 and concluded that
10 they allow federal agencies to use their investigative powers after initiating an enforcement
11 action. See *In re McVane*, 44 F.3rd 1127, 1140-1141 (2d Cir.1995) (An invitation to discuss
12 settlement before the filing of a civil action did not moot outstanding administrative subpoenas);
13 *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508,
14 1517-1518 (D.C. Cir. 1993) (The initiation of civil proceedings did not preclude the agency from
15 seeking the enforcement of administrative subpoenas. The Court rejected “the argument that the
16 investigation must terminate when litigation begins,” in part, because “the statute authorizing
17 RTC investigations [does not] contemplate the termination of investigative authority upon the
18 commencement of civil proceedings. Without mention of substantive limitation, Congress
19 empowered the RTC to issue administrative subpoenas to facilitate investigations ‘for purposes
20 of carrying out any power, authority or duty’ under the statute.”); *United States v. Merit*
21 *Petroleum, Inc.*, 731 F.2d 901 (Emerg.App. 1984) (The Department of Energy’s issuance of a
22 notice of probable violation did not prevent the enforcement of an administrative subpoena that
23 had been issued before the commencement of the action.); *United States v. Thriftyman, Inc.*, 704
24 F.2d 1240 (Emerg.App. 1983) (The Court enforced administrative subpoenas that were issued
25 after the Department of Energy initiated an administrative enforcement proceeding.).
26

1 These federal decisions emphasize the broad investigative authority that Congress had
2 delegated to the administrative agencies and the fact that their statutes do not expressly preclude
3 the agencies' authority to investigate before or after the initiation of civil or administrative
4 proceedings. Based on the broad authority that the Arizona Legislature has given the Division to
5 investigate matters relating to the offer, sale, and purchase of securities, it is likely that our courts
6 would uphold subpoenas issued under similar circumstances, providing the Division is acting in
7 good faith. See Securities and Exchange Commission v. Dresser Industries, 628 F.2d 1368, 1375
8 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980) (An administrative agency may subpoena
9 information for an appropriate enforcement purpose, whether or not there is a parallel criminal
10 proceeding, absent special circumstances which provide "specific evidence of agency bad faith or
11 malicious governmental tactics."). Here, the Division has acted in good faith and simply issued
12 (or, perhaps, re-issued because the first was not complied with) a subpoena to the custodian of
13 records of 3GMI. As such, the subpoena will be enforced and Sargent must produce the records.

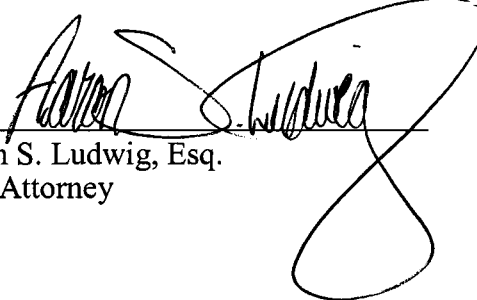
14 Custodians of records do not have Fifth Amendment rights; thus, Sargent, as the
15 custodian of records of 3GMI, may not assert these rights in refusal to comply with the subpoena
16 at issue. The United States Supreme Court has held that:

17 The custodian of corporate records may not resist a subpoena for such records on the
18 ground that the act of production will incriminate him in violation of the Fifth
19 Amendment. Representatives of a collective entity act as agents, and the official records
20 of the organization that are held by them in a representative rather than a personal
21 capacity cannot be the subject of their personal privilege against self-incrimination, even
22 though production of the papers might tend to incriminate them personally. The plain
23 mandate of the precedents is that the corporate entity doctrine applies regardless of the
24 corporation's size, and regardless of whether the subpoena is addressed to the corporation
25 or, as here, to the individual in his capacity as the records' custodian. Any claim of Fifth
26 Amendment privilege asserted by the agent would be tantamount to a claim of privilege
by the corporation, which possesses no such privilege. Recognizing a Fifth Amendment
privilege on behalf of records custodians of collective entities would have a detrimental
impact on the Government's efforts to prosecute "white-collar crime." Such impact
cannot be satisfactorily minimized by either granting the custodian statutory immunity as
to the act of production or addressing the subpoena to the corporation and allowing it to
choose an agent to produce the records who can do so without incriminating himself."
Braswell v. United States, 487 U.S. 99, 99, 108 S.Ct. 2284, 2285 (1988).

As the custodian of records of 3GMI, Sargent filed the Notice to avoid compliance with the subpoena at issue and has tried to implicate his Fifth Amendment rights in this matter by arguing that the only possible reason for the Division issuing the subpoena is to further a criminal investigation and that every time the Division issues a subpoena after the initiation of an administrative contested case, it is evidence that a criminal investigation is underway. Based on the foregoing, Sargent's Fifth Amendment rights are not implicated in this matter; the subpoena is valid and enforceable; and, Sargent must produce the records.

RESPECTFULLY SUBMITTED this 10th day of March 2009.

**SECURITIES DIVISION of the
ARIZONA CORPORATION COMMISSION**



Aaron S. Ludwig, Esq.
Staff Attorney

ORIGINAL and **13 COPIES** of the foregoing filed this 10th day of March 2009 with:

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Phoenix, AZ 85007

COPY of the foregoing mailed/delivered this 10th day of March 2009 to:

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